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SASITHORN MAROT v. BRUNO MAROT & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
ROZANA ALI YUSOFF JC
[NO: WA-33-679-12-2017]
9 JANUARY 2019

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CIVIL PROCEDURE: *Injunction – Anti-suit injunction – Injunction to restrain husband from proceeding with divorce proceedings in Thailand – Whether Malaysia natural forum to determine divorce issues of maintenance and property division between parties – Whether proceedings in foreign court would be vexatious and oppressive – Whether an anti-suit injunction would offend principles of comity – Rules of Court 2012, O. 29 r. 1 – Courts of Judicature Act 1964, ss. 23 & 25 – Law Reform (Marriage and Divorce) Act 1976, s. 76*

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FAMILY LAW: *Divorce – Proceedings – Application for injunction to restrain husband from proceeding with divorce proceedings in Thailand – Whether Malaysia natural forum to determine divorce issues of maintenance and property division between parties – Whether proceedings in foreign court would be vexatious and oppressive – Whether an anti-suit injunction would offend principles of comity – Rules of Court 2012, O. 29 r. 1 – Courts of Judicature Act 1964, ss 23 & 25 – Law Reform (Marriage and Divorce) Act 1976, s. 76*

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The petitioner, a Thai national, and the respondent, a French national, were married in Bangkok, Thailand on 3 September 1990. The marriage was subsequently registered at the France Embassy in Bangkok. Throughout the marriage, they were blessed with two children ('the children'). Both the petitioner and the respondent were residents and have been residing in Malaysia since 2004. Their matrimonial home, marital assets and the respondent's business remained in Malaysia. The petitioner filed a divorce petition where she had prayed, among others, a decree of divorce to be granted. The respondent and co-respondent then filed an application to strike out the divorce petition on ground of jurisdiction, which was however dismissed by the High Court and the Court of Appeal, on the basis that the court in Malaysia had jurisdiction to hear the case. However, the respondent refused to withdraw his divorce proceeding which he had filed in Thailand. In response to the respondent's refusal to withdraw the action, a notice of application was filed by the petitioner (encl. 63) under O. 29 r. 1 of the Rules of Courts 2012, ss. 23 and 25 of the Courts of Judicature Act 1964 for an anti-suit injunction order against the respondent to restrain the respondent from proceeding with his divorce proceedings filed in Thailand and also to restrain from enforcing any orders obtaining therefrom. The plaintiff submitted, *inter alia*, that the petitioner would be disadvantaged as the petitioner would not be able to obtain orders for the division of matrimonial assets in Malaysia and that the respondent would have an unfair advantage

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in that if he obtained his divorce in Thai court, there would be no enforceable financial orders that could be made against him there. The issues that arose were (i) whether Malaysia was the natural forum to determine the divorce issues of maintenance and property division between the parties; (ii) whether the proceedings in the foreign court were vexatious and oppressive; and (iii) where Malaysia was the natural forum, an anti-suit injunction did not offend the principles of comity.

Held (granting order in encl.63):

(1) Both the respondent and petitioner have been living in Malaysia for the past 14 years *ie,* since 2004 as husband and wife. Their matrimonial home was in Sungai Buloh Malaysia where they have been living in since 2009 and the petitioner continued to live and remain in the matrimonial home until to this date even after the respondent abandoned the matrimonial home in May 2014. The respondent also had his own company in Malaysia where he was the shareholder and director and still maintained a Malaysian HSBS bank account and credit cards in Malaysia. There was also evidence relating to the petitioner's expenses and maintenance in Malaysia. Both parties had no matrimonial home, no assets, income or businesses in Thailand. The respondent also gave no cogent reason as to why he had filed the divorce proceeding in Thailand. Further, the disputes as to the cause of the breakdown of the marriage was *ie,* an adulterous relationship with the co-respondent, a Malaysian living in Malaysia. Thus, Malaysia was the natural forum since the parties have the closest connection in respect of their marriage, matrimonial home, assets and expenses including the income of the respondent. (paras 19-20)

(2) The respondent only sought a divorce and demanded for the costs of the divorce and did not address the ancillary relief for the petitioner such as maintenance and division of matrimonial assets. It naturally followed that the Malaysian courts would have no power to order in respect of such ancillary relief if the divorce was pronounced by the Thailand courts. On the same footing, this would also put the petitioner in difficulty to prove her case against the co-respondent as the main cause of the marriage breakdown. It would place the petitioner in a burdensome position since the evidences were only available in Malaysia with regards to witnesses and documents. The petitioner would be prejudiced and be put in an untenable position. The difficulty in the enforcement of any orders given in Thai court could be considered as vexatious and oppressive to the petitioner as even in the event the petitioner succeeded in obtaining orders for the division of assets in Thailand, the order would be enforcement of assets in Malaysia. Thailand and Malaysia do not have an arrangement or agreement for

reciprocal enforcement of court orders, even monetary orders. Therefore, the enforcement orders should be granted by the court in Malaysia. (paras 21 & 22)

(3) It is trite law in Malaysia as granted under s. 76 of the Law Reform (Marriage and Divorce) Act 1976 which specifically states that the court shall have power when granting a decree of divorce to order the division between the parties of any assets acquired during the marriage. Accordingly, once a divorce has been pronounced in the Thai court, the Malaysian court will have no power to order a division of assets, regardless that the assets are located in Malaysia, which would be oppressive against the petitioner. The Thai divorce proceeding was vexatious and oppressive against the petitioner. On the other hand, there was no injustice to the respondent in the event the Malaysian courts were to continue and the Thai Proceedings were to be restrained since earlier the respondent had also already submitted to the Malaysian jurisdiction as to the divorce petition. (paras 24 & 25)

(4) The anti-suit injunction was made *in personam* against the respondent and therefore, there was no issue of comity since the order was directed not against the foreign court but against the parties so proceeding or threatening to proceed. (para 26)

Case(s) referred to:

Berjaya Industrial Bhd & Anor v. Public Bank (L) Ltd & Ors [1995] 4 CLJ 504 HC ***(refd)***

BSNC Leasing Sdn Bhd v. Sabah Shipyard Sdn Bhd & Ors And Another Appeal [2000] 2 CLJ 197 CA ***(refd)***

Insurance Company of the State of Pensylvannia v. Equitas Insurance Ltd [2013] EWHC 3713 ***(refd)***

Ledra Fisheries Ltd (supra); Insurance Company of the State of Pensylvannia v. Equitas Insurance Ltd [2013] EWHC 3713 ***(refd)***

Leong Poh Shee v. Ng Kat Chong [1965] 1 LNS 212 ***(refd)***

Lesco Development Corp Sdn Bhd v. Malaysia Building Society Bhd [1987] 2 CLJ 290 SC ***(refd)***

Mobikom Sdn Bhd v. Inmiss Communications Sdn Bhd [2007] 3 CLJ 295 CA ***(refd)***

Societe Nationale Industrielle Aerospatiale v. Lee Kui Jak & Ors [1987] 1 LNS 46 PC ***(refd)***

Spiliada Maritime Corp. v. Cansulex Ltd [1986] 3 All ER 843 ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, ss. 23, 25

Law Reform (Marriage and Divorce) Act 1976, s. 76

Rules of Court 2012, O. 29 r. 1

Other source(s) referred to:

Chesire and North's Private International Law, 12th edn, pp 231-232

For the petitioner - YN Foo, Kiran Dhaliwal & MW Ong; M/s YN Foo & Partners

For the respondent & co-respondent - J Sharmesh & Charlotte Diana; M/s Jeeva Partnership

Reported by Suhainah Wahiduddin

JUDGMENT

Rozana Ali Yusoff JC:

Introduction

[1] This is a notice of application filed by the petitioner/wife ("the petitioner") ie, (encl. 63) under O. 29 r. 1 of the Rules of Courts 2012, s. 23 and 25 of the Courts of Judicature Act 1964 for anti-suit injunction order against the respondent/husband ("the respondent") to restrain the respondent from proceeding with his divorce proceedings filed in Thailand and also to restrain from enforcing any orders obtaining therefrom.

[2] On 16 October 2018, I accordingly granted the order as prayed in encl. 63 and for the costs of RM4,000 to be paid to the petitioner by 7 January 2019.

[3] The respondent then filed a notice of appeal dated 14 November 2018, to appeal my entire decision handed on 16 October 2018 (except for any decision made after trial). My full grounds of judgment are as discussed in the paragraphs below.

Background Facts

[4] The petitioner and the respondent were married on 3 September 1990 at Phaya Thai District Province, Bangkok Thailand. The marriage was subsequently registered at the France Embassy, Bangkok, Thailand on 13 September 1990. Throughout the marriage, they were granted two children, namely Eiza Emmy Marot born on 25 August 1994 and Andre Paul Marot born on 27 December 1998 ("the children").

[5] The petitioner is a Thai national while the respondent is a French national. Both the petitioner and the respondent were resident and have been residing in Malaysia since 2004. The petitioner had resided in Malaysia throughout the period of two years immediately preceding the presentation of the petition at an address of No. 2 Elitis Ambal Biru Valencia, Sungai Buloh, 47000 Selangor. Their matrimonial home, marital assets and respondent's business remained in Malaysia.

[6] On 6 December 2017 the petitioner filed a divorce petition where the she had prayed, among others that:

(i) a decree of divorce to be granted;

(ii) a monthly sum of RM5,000 as maintenance;

(iii) the transfer of the matrimonial home to the petitioner;

(iv) the insurance premiums of for the Petitioner's Insurance Policy and premiums;

(v) the petitioner's medical and dental expenses;

(vi) monthly instalments for the motor vehicle Mazda 2 bearing registration No. WC 1634N; and

(vii) the children's maintenance including for their education.

[7] The respondent and co-respondent namely Fanny Tan Boon Sim then filed an application to strike out the divorce petition on ground of jurisdiction but the said application was dismissed on 7 March 2018. They subsequently appealed to the Court of Appeal but was also dismissed on 13 August 2018 on the basis that the court in Malaysia has jurisdiction to hear the case.

[8] Despite what had happened, the respondent refused to withdraw his divorce proceeding which he had filed in Thailand on 24 November 2017 *vide* the Court Case Number 420/2560 of the Central Juvenile and Family Court (Miri Buri Branch) ("the Thai divorce") where the hearing was fixed on 25 October 2018.

[9] In response to the respondent's refusal to withdraw the action, the petitioner filed an application under encl. 63 for an injunction to restrain the respondent by himself or any person whosoever from:

(i) proceeding with the proceedings in the Court Case No. 420/2560 of the Central Juvenile and Family Court (Min Buri Branch) in Thailand; and

(ii) enforcing any orders obtained in Court Case No. 420/2560 of the Central Juvenile and Family Court (Min Buri Branch) in Thailand (if any) with regard to the marriage between the parties, including for the division of matrimonial assets, and maintenance of the petitioner and the children of the marriage; and costs.

[10] The grounds for the anti-suit injunction application (encl. 63) are:

(i) the respondent and co-respondent's application to struck out the petitioner's divorce petition was dismissed by the High Court and Court of Appeal;

(ii) the respondent's divorce proceeding filed in Thailand on 24 November 2017 is still ongoing;

(iii) the respondent intends to progress the Thai Divorce, which is vexatious, oppressive and against the interest of justice as the petitioner will be disadvantaged as P will not be able to obtain orders for the division of matrimonial assets in Malaysia and have issues with the enforcement of any orders from Thailand.

(iv) the respondent is having an unfair advantage in that if he obtained his divorce in Thai court, there will be no enforceable financial orders can made against him there.

Analysis And Findings

[11] It has been decided earlier by the Court of Appeal that our court has the jurisdiction to hear and deal with the divorce and the ancillary issues when the Court of Appeal dismissed the respondent's appeal to strike out the proceeding in Malaysia. Therefore the next issue is whether this court has the power to grant an anti-suit injunction as prayed by the petitioner. It is clear that a court has jurisdiction and power to grant an anti-suit injunction whenever the interests of justice call for or demand it. An injunction may be issued by our courts to restrain the institution or prosecution of a suit in a foreign jurisdiction where this would lead to a multiplicity of proceedings see (*Mobikom Sdn Bhd v. Inmiss Communications Sdn Bhd* [2007] 3 CLJ 295) In *BSNC Leasing Sdn Bhd v. Sabah Shipyard Sdn Bhd & Ors And Another Appeal* [2000] 2 CLJ 197, the Court of Appeal held that:

> Whether the institution or threatened institution of proceedings in a foreign court would be vexatious or oppressive would depend upon the peculiar facts of the particular case. When deciding this question, a court must have regard to all the circumstances of the case including such matters as comity, the interests of the parties, the connection that the dispute has with the alternative forums and the need to exercise caution when restraining foreign proceedings.

[12] Test and principles applicable to anti-suit injunctions:

(i) whether Malaysia is the natural forum to determine the divorce issues of maintenance and property division between parties;

(ii) whether the proceedings in the foreign court are vexatious and oppressive;

(iii) where Malaysia is the natural forum, an anti-suit injunction does not offend the principles of comity;

[13] It is also an established principle of law that the interest of justice will not be served by having two or more courts hearing the same dispute or each hearing only part of a larger, complex dispute: *Lesco Development Corp Sdn Bhd v. Malaysia Building Society Bhd* [1987] 2 CLJ 290; [1987] CLJ (Rep) 160; [1988] 2 MLJ 184.

[14] In *Berjaya Industrial Bhd & Anor v. Public Bank (L) Ltd & Ors* [1995] 4 CLJ 504; [1996] 5 MLJ 389 where Abdul Malek J (as he then was) adopted the following passage in *Chesire and North's Private International Law* (12th edn) at pp. 231-232:

> "If litigation involving the same parties and the same issues is continuing simultaneously in two different countries, this is referred to as a case of *lis alibi pendens*". In such cases the issue facing the English court is not simply that of deciding to which of the alternative forum the plaintiff should have to go to bring his action. Instead, the choice is between, on

A the one hand, trial in England plus trial abroad (if a stay is granted). *It is very undesirable to have concurrent actions in England and abroad: this involves more expense and inconvenience to the parties than if the trials were held in merely one country; it can also lead to two conflicting judgments, with an unseemly race by the parties to be the first to obtain a judgment and to subsequent problems of estoppel.* (emphasis added)

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[15] In addressing the stay application of this nature, I am reminded that the court is required to look at the matter globally in determining where the balance of justice lies. Generally speaking, this court will only restrain the respondent from pursuing the proceedings in the foreign court if such pursuit would be vexatious or oppressive. Therefore, for this present case, the C question to ask is: would the benefits to the petitioner be outweighed by the disadvantages to the respondent, or would policy considerations in the management of court proceedings militate against the exercise of discretion in favour of a stay? (see *Ledra Fisheries Ltd (supra)*; *Insurance Company of the State of Pensylvannia v. Equitas Insurance Ltd* [2013] EWHC 3713; *Leong Poh* D *Shee v. Ng Kat Chong* [1965] 1 LNS 212; [1966] MLJ 86.

[16] Thus since I am concerned with the ends of justice that account must be taken not only of injustice to the petitioner if the respondent is allowed to pursue the foreign proceedings, but also of injustice to the respondent if is he is not allowed to do so. So, as a general rule, the court will not grant E an injunction if, by doing so, it will deprive the respondent of advantages in the foreign forum of which it would be unjust to deprive him. The leading case on the subject is *Spiliada Maritime Corp. v. Cansulex Ltd.* [1986] 3 All ER 843, where Lord Goff of Chieveley formulated the underlying principle in the following terms (at p. 854):

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> The basic principle is that a stay will only be granted on the ground of *forum non conveniens* where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, ie, in which the case may be tried more suitably for the interests of all the parties and the ends of justice.

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[17] Therefore there must be something vexatious or oppressive before the court will interfere to restrain an action in a foreign court. It lies on the petitioner to show that the foreign action brought by the respondent is vexatious or oppressive. A stay should only be granted if the benefits of doing so clearly outweigh any disadvantage to the other party and there can be no H actual prejudice or even an appearance of unfairness when the petitioner is given to enforce her rights through the Malaysian suit.

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[18] Keeping in mind that the Court of Appeal has clearly recognised that Malaysia has the jurisdiction and is the appropriate forum to hear and deal with the divorce and the ancillary issues as regards the marriage between the respondent and petitioner, I took cognisance the facts and evidence to determine whether this court is also the natural forum to deal the divorce issues of maintenance and property division between the parties.

[19] It was not disputed that both the respondent and petitioner have been living in Malaysia for the past 14 years ie, since 2004 as husband and wife. In fact their matrimonial home is in Sungai Buloh Malaysia where they lived there since 2009 and the petitioner continues to live and remained in the matrimonial home until to this date even after the respondent abandoned the matrimonial home in May 2014. It was admitted by the respondent that he has his own company in Malaysia where he is the shareholder and director and still maintains a Malaysian HSBS bank account and credit cards in Malaysia. The petitioner on the other hand owned a car where the monthly hire purchase payments are made under the respondent's HSBS account and there are evidence relating to the petitioner's expenses and her maintenance are in Malaysia. It was also not disputed that both parties have no matrimonial home, no assets, income or businesses in Thailand. The only connection with Thailand is where their marriage was registered in 1990 and the petitioner is a Thai national. The respondent gave no cogent reason as to why he had filed the divorce proceeding in Thailand other than the marriage was registered in Thailand. In addition, the evidence tendered as to the breakdown of the marriage, *inter alia*, the adulterous relationship with the co-respondent, a Malaysian living in Malaysia. There are also evidences relating to the respondent's domestic violence against the petitioner and her reports from Sungai Buloh Hospital, Selangor.

[20] Given all the evidence and the facts above, I am satisfied that Malaysia is the natural forum since the parties have the closest connection in respect their marriage, matrimonial home, raising the family, assets and expenses including the income of the respondent. Further, the disputes as to the cause of the breakdown of marriage ie, adulterous relationship, involves with the party whom is available in Malaysia. I took note also that the marriage was registered in Thailand but I am of the considered view that such registration is insufficient to conclude that Malaysia is not the natural forum after having evaluated and considered all the facts and evidence before me.

[21] As to whether the Thai divorce proceeding is vexatious and oppressive against the petitioner, we need to evaluate the facts presented. It is clear that the respondent only seeks a divorce and demands for the costs of the divorce and did not address the ancillary relief for the petitioner such as maintenance and division of matrimonial assets. It naturally follows that our court will have no power to order in respect of such ancillary relief even though the

assets are in Malaysia if the divorce is pronounced by the Thailand's court. It must be noted that it was also not disputed by both parties that they are now living in Malaysia and all of their assets are also in Malaysia and none are in Thailand. On the same footing, this will also put the petitioner in difficulty to prove her case against the co respondent as the main cause of the marriage breakdown.

[22] In the totality it will place the petitioner in a burdensome position since the evidences are only available in Malaysia with regards to witnesses and documents. In my opinion the petitioner will be prejudiced and is in an untenable position if any Thai divorce is granted. The petitioner would not be able to enforce any Thai orders for ancillary relief against the respondent when the respondent himself is not in Thailand while all of their assets are in Malaysia. On this score the difficulty in the enforcement of any orders given in Thai court can be considered as vexatious and oppressive to the petitioner as even in the event the petitioner succeeds in obtaining orders for the division of assets in Thailand, the order will be for enforcement of assets in Malaysia. Further, Thailand and Malaysia do not have arrangement or agreement for reciprocal enforcement of court orders, even monetary orders. Therefore to avoid such impediments, I am of the considered view that the enforcement orders should be granted by the court in Malaysia.

[23] I am also unable to agree with the respondent that there will be no loss of personal or judicial advantage if the divorce is granted in Thailand since the Thai Civil and Commercial Code has provided extensive reliefs for the petitioner if the divorce order is granted in Thailand. It is settled law that Malaysian court can recognise a foreign decree of divorce relying on common law principle. I am also unable to agree with the respondent that Thailand is the natural forum for the resolution of the dispute between the parties. The subject matter of this divorce petition is a foreign marriage which is unregistered in Malaysia.

[24] It is a trite law in Malaysia as granted under s. 76 of the LRA which specifically states that the court shall have power when granting a decree of divorce to order the division between the parties of any assets acquired during the marriage. Accordingly, once a divorce has been pronounced in the Thai court, the Malaysian court will have no power to order a division of assets, regardless that the assets are located in Malaysia which, in my view, that it will be oppressive against the petitioner.

[25] Taking all these facts and legal positions, I find that the Thai divorce proceeding is vexatious and oppressive against the petitioner. On the other hand, there is no injustice to the respondent in the event our court continues and the Thai proceedings is restrained since earlier the respondent has also already submitted to our jurisdiction as to the divorce petition.

[26] I also considered the respondent submission that the petitioner's application for anti-suit injunction is an infringement of comity as the decision of Thai court would pre-empted by this court's order. In relation to this, I am of the opinion that the anti-suit injunction is made *in personam* against the respondent and therefore there is no issue of comity since the order is directed not against the foreign court but against the parties so proceeding or threatening to proceed. It should bear in mind that this court does not pretend to any interference with the other court; it acts upon the respondent by punishment for his contempt in his disobedience to the order of the court. See *Societe Nationale Industrielle Aerospatiale v. Lee Kui Jak & Ors* [1987] 1 LNS 46; [1987] 2 MLJ 397 where the Privy Council had recognised that the injunction itself is directed against the parties and not directed against the foreign court.

[27] I have given careful consideration, accordingly grant the order as prayed. Costs of RM4,000 to be paid by the respondents before 7 January 2019.